The Indiana Prosecutor

April/May 2007

Farjardo is Fixed!!!

On January 16, 2007, the Indiana Supreme Court handed down a case that has plagued prosecutors since that time. Eligio C. Fajardo was originally charged with one count of Child Molesting as a Class C Felony. During a deposition, the victim disclosed details of another act of molest. Immediately following the deposition, but just after the omnibus date had passed, the prosecutor filed an additional A felony count of molest. After finding that the substantial rights of the defendant were not prejudiced, the trial court allowed the amendment. This ruling was consistent with over twenty years of case law.

Fajardo was convicted of both counts at trial and appealed. The Supreme Court found that by amending the charging information to add a second count of molest, the state was amending the information in substance and not form. They noted that Indiana Code 35-34-1-5 strictly limited amendments in substance for a felony charge to 30 days before the omnibus date, regardless of whether the defendant suffered any prejudice from the amendment.

Senate Bill 45 was passed out the last day of the legislative session. Portions of the bill addressing two areas of I.C. 35-34-1-5 became effective on May 8, 2007. Most importantly, the period of time to make amendments in substance to the charging information was extended. Now a prosecutor may make amendments in substance before the commencement of trial if the amendment doesn't prejudice the substantial rights of the defendant.

I.C. 35-34-1-5-(b) is amended as follows.

> (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:
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> **(1)** up to:
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> (1) **(A)** thirty (30) days if the defendant is charged with a felony; or
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> (2) **(B)** fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors; before the omnibus date; **or**
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> **(2) before the commencement of trial; if the amendment does not prejudice the substantial rights of the defendant.** When the information or indictment is amended, it shall be signed by the prosecuting attorney **or a deputy prosecuting attorney.**

The second change is to clarify the time frame for filing enhancements for Habitual Offenders as life without parole, I.C. 35-50-2-8.5, and Habitual Controlled Substance Offenders, I.C. 35-5-2-10, enhancements. These enhancements will be required to be filed not later than ten days after the omnibus date, which is consistent with the current requirement for filing a general Habitual Offender enhancement.

Inside this Issue

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www.prosecutor.info

- *A warrant is not a detainer under the Interstate Agreement on Detainers*

State v. Robinson, (Ind. Ct. App. 4/4/07). Jacob Robinson was charged with dealing in Marijuana by the Clark County Prosecutor's office. After the case was initiated, Robinson fled to Kentucky. When Robinson failed to appear at a final pre-trial conference, the judge issued a re-arrest warrant for Robinson. After approximately ten months, the Clark Superior Court was notified that Robinson was located in a Kentucky jail. While awaiting the resolution of his Kentucky charges, Robinson signed a waiver of extradition form. After he was convicted, Robinson was transferred to a Kentucky Department of Corrections facility where he requested paperwork to start an "IAD." The prison never provided Robinson with any paperwork. After more than 180 days, Robinson filed a motion to dismiss his Clark County charges.

Robinson argued that because he was being held on the Clark County failure to appear warrant, the time for returning him to Indiana under the Interstate Agreement on Detainers had elapsed and the State of Indiana was precluded from prosecuting him on the dealing charge. Indiana Code 35-33-10-4 establishes the provisions of the IAD. The applicable section of the statute is as follows:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which *a detainer has been lodged* against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. (Italics added)

The Court of Appeals noted that before the provisions of the IAD apply, a *detainer* must be lodged against the defendant. While a failure to appear warrant had been served on Robinson, the State made no effort to lodge a formal detainer against Robinson. The Court found that a warrant did not equal a detainer as contemplated under the statute. Therefore, the terms of the IAD had not been breached and the State was free to prosecute Robinson on his dealing charge.

After this decision was announced, Mara McCabe, who handles the IADs for the Attorney Generals Office, contacted our office and offered the following information to avoid problems with the IAD.

1. Prosecutors should meet with their Sheriff and remind him/her that when another state's DOC facility calls and says "You have an open warrant on Fred Smith, do you still want him?" That the deputy who takes the call or telex says only..... "Yes, we have a warrant. Please call the prosecutor to see if they wish to file a detainer." The recent spate of inmate requests have come because prisons have called sheriffs inquiring about open warrants on an inmate and when the sheriff responds "yes, we have an open warrant and will extradite" or "Yes, we want him" the prison takes (that as) a detainer. [The sheriff should **never** tell the prison that the inmate is "still wanted." Only the prosecutor can make that call. The prosecutor has responsibility for the inmate under a detainer, not the sheriff or jailer.]
2. When a Prosecutor receives an IAD request for final disposition filed by an inmate (form 3), and no formal detainer has been filed, the prosecutor needs to send a (certified) letter to the records department of the prison stating that no formal detainer has been filed against the inmate, citing the new *Robinson* case, and that the inmate's request is premature and will not be acknowledged. It's a good idea to send copies of the letter to our DOC and Mara, that way we know what's going on. In most cases, the prosecutor will need to explicitly tell the prison that an open warrant is NOT a detainer under Indiana law. In that same letter, the prosecutor may lodge a formal detainer, if so desired, or may wait until a later time to do so.
3. Prosecutors should ensure that the judges in their county understand what a detainer is. A detainer is NOT an open warrant. A detainer is a formal request from the prosecutor to the re-

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cords department of the prison in the other jurisdiction requesting that the prison detain the inmate on charges pending in Indiana. Only after this formal detainer has been lodged may the inmate request final disposition.

4. There is a difference between a "hold" and a "detainer" and the difference is crucial. A "hold" generally refers to holding someone who is in a city or county jail. A "detainer" is very specific and only applies to requests filed under the IAD.
5. When in doubt, they should call Mara.

We need to have a unified front on this so that all prosecutors are doing the same thing with these issues. I will be meeting with the DOC to determine that they are not treating open warrants from other states as detainers.

This is a troublesome area of the law and I have learned that many prosecutors think, incorrectly, that an inmate can initiate a detainer. An inmate cannot do so. The detainer is lodged only by the prosecutor in the jurisdiction where untried charges are pending. Then the inmate can request final disposition. There is no such thing as an "inmate initiated detainer" and it's unfortunate that the IAD uses those words because it's confusing and wrong.

If you have any questions on the IAD or detainers feel free to contact Mara at 317-233-1665.

- *Search Warrants*

State v. Rucker 861 N.E.2d 1240 (Ind. Ct. App. 2007). A motion for transfer was filed on March 30, 2007 by the Attorney General. Absent a ruling on the motion to transfer, this case remains a reminder that courts may follow the exact letter of the law.

Melissa Rucker lived in Dearborn County. In August of 2005, Indiana State Police troopers flew over Rucker's residence and observed marijuana growing on her property. Based on their observations the troopers prepared a search warrant affidavit which they presented to the Dearborn Circuit Court Judge. After the search warrant was granted, the troopers seized marijuana and other drug related property from Rucker's home.

Fifteen days after serving the warrant, prosecutors filed five counts of possession of marijuana and other drug related charges. On the day that the charges were filed, the search warrant and supporting affidavit were filed with the clerk. Rucker filed a Motion to Suppress the evidence based on the delayed filing of the affidavit. The Motion to Suppress was granted. Having lost its evidence, the State dismissed its case and sought this appeal.

Indiana Code 35-33-5-2(a) states:

a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued *until there is filed with the judge an affidavit*:

(1) particularly describing:

(A) the house or place to be searched and the things to be searched for; or

(B) particularly describing the person to be arrested;

(2) alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:

(A) the things as are to be searched for are there concealed; or

(B) the person to be arrested committed the offense; and

(3) setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

The Court of Appeals relied heavily on the requirement that an affidavit be filed before the warrant is issued. Finding that the detective did not follow statutory procedure, the Court of Appeals found that the search was illegal. The trial court was affirmed.

In the wake of this case, you may wish to remind detectives to take several blank copies of an affidavit and warrant with them when they are seeking a search warrant. One copy must be left with the judge and your detective will want to keep an original for their file.

- *Jury Rule 28 & I.C. 34-36-1-6*

In *Ronco v. State* 862 N.E.2d 257 (Ind. 2007), the Indiana Supreme Court provides guidance to interpretating Jury Rule 28 and I.C. 34-36-1-6. Jason Ronco was charged with battery to a law enforcement officer, resisting law enforcement and disorderly conduct stemming from a Terry stop

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in Porter County. During deliberations the jury sent a message to the Court requesting a clarification of resisting law enforcement. The submitted instruction included language for both forcible resist as well as fleeing resist. The Jury was confused as to whether they were required to find that the defendant had violated the elements of both flight and physical resist before they could find the defendant guilty. In response the Court instructed the jury to re-read the instructions. Upon receiving the response, one juror remarked to the bailiff that he still didn't understand and that "it was going to be a long night." This information was passed on to the judge who declared that the jury had reached an impasse under Jury Rule 28 and had the jury return to the courtroom to re-read two instructions.

After re-reading the two instructions, the Judge asked the jury if their confusion was resolved. When they asked further questions the Judge answered the questions without first consulting with counsel. Ronco was subsequently convicted of resisting law enforcement. On Appeal, Ronco argued that the jury had not reached and impasse, that the court erred by only reading two of the final instructions and that the Judge should not have clarified the resisting law enforcement instruction for the jury.

In determining whether the jury had reached an impasse, the Supreme Court turned to Jury Rule 28, Assisting jurors at an impasse.

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

They looked at whether the jury was really deadlocked and who had suggested that they might not reach a verdict. The Court placed great weight in the fact that it was not the jury foreman but one of the jurors who indicated there was a conflict. Chief Justice Shephard wrote, an "indication of an impasse must come from the jury's leader or from the jury as a whole. Further, they found that the jurors only had a question about the instruction and wrote "a question is not an impass. Nor does one juror's "long night" comment suffice" and found that the question did not rise to the level of an impasse.

While the court found that the situation articulated here did not rise to an impasse they did feel that the court's action was proper under IC 34-36-1-6.

> **34-36-1-6. Jury questions during deliberations.** If, after the jury retires for deliberation:**(1)** there is a disagreement among the jurors as to any part of the testimony; or **(2)** the jury desires to be informed as to any point of law arising in the case; the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

The Court instructed that IC 34-36-1-6 gave courts greater flexibility and discretion to assist jurors with questions during deliberations. They found that the trial court must respond to a jury question regarding a point of law. Here the trial court appropriately answered the jurors question and the conviction was affirmed.

- *Search Warrant that described items to be seized as "trace evidence" sufficiently described the items to be collected.*

State v. Foy, 862 N.E.2d 1219 (Ind. Ct. App. 2007)
Robert Foy's wife Diane was found unresponsive and believed to be dead in her home by Carol Jones. Ms. Jones called 911. The 911 operator instructed Ms. Jones to move Diane to the floor and start CPR. As Ms. Jones began to move Diane she noticed bruising to her head and throat. Jones exclaimed over the telephone "oh God, I think he killed her." Robert Foy was in the home at the time and told Jones that his wife had left to ride her motorcycle. Approximately twenty minutes later, he found her face down in a pond. He had carried her body to their home and laid her on the couch.

When officers arrived at the scene, they noticed that Diane Foy's clothes were dry and that there was a bloody rag by Diane's body. After Robert Foy left the room, they noticed the rag was gone. Officers also noticed that Foy had a red substance on his clothes and on his arm. No water was found in Diane's lungs and Foy's account of her drowning was discounted.

Detective Stephen McCord of the Randolph County Sheriff's Department spoke with the witnesses and prepared a

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Recent Decisions (continued)

search warrant for Foy and his residence. The warrant specifically asked for "any and all trace evidence" found on Foy's person, in the residence, any outbuilding on the property, and any vehicle on the property. After the warrant was granted, members of the Randolph County Sheriff's Department recovered over sixty items of personal property that appeared to contain red stains as well as samples from Foy's body.

Foy was charged with murder. He filed a motion to suppress the warrant on the basis that the term "trace evidence" did not sufficiently specify the items to be seized. The trial court found that there was probable cause to issue the warrant, but agreed with Foy and granted the defendant's Motion to Suppress. Arguing that the "trace evidence" was sufficiently particular to specify the items to be seized, the State requested certification of the issue for an interlocutory appeal.

Our Supreme Court has found that a warrant must describe both the place to be searched and the items to be seized. A description is required of the items to be recovered but an exact description is not required. *Overstreet v. State*, 783 N.E.2d 1140 (Ind. 2003). Here officers were attempting to determine whether Diane Foy's death was a homicide. Noting that Indiana had only one case which appeared to accept the use of the term "trace evidence" the Court of Appeals reviewed both Federal and other State opinions for direction. Citing a Supreme Court decision from Washington, the Court noted that "as a term of art, 'trace evidence' means 'small items of a foreign material left on another', of which there are many possible types, including 'blood, hairs, [and] fibers....'" State of Washington v. Clark, 24 P. 3d 1006 (Wash. 2001). Due to the nature of a homicide investigation it is impossible to know exactly what type of evidence might be contained in the scene. Therefore, it is reasonable to use a generic term to describe the evidence to be collected.

The Appellate Court concluded that the warrant was not invalid. Officers did not have unbridled discretion to seize evidence, but were limited to taking only that evidence which they determined might be relevant in determining whether Diane Fry was murdered. The warrant was sufficiently limited in the locations that officers could search and the term "trace evidence" did not invalidate the warrant as lacking specificity.

In Memoriam—Malcolm Edwards

Former Henry County Prosecutor, Malcolm Edwards, died Sunday, April 29, 2007. Upon Mr. Edward's predecessor's resignation, Mal was elected by the precinct committeemen, elected to two full terms of his own, serving as Henry County Prosecutor from 1984 to December 31, 1994. Before current prosecutor, Kit C. Dean Crane's deployment to Iraq, Mr. Crane hired Mal as a contracted deputy prosecutor and he helped the chief deputy manage the prosecutor's office until Mr. Crane's return.

Indiana Judicial Rules Committee

Keith Henderson, Floyd County Prosecutor, has been appointed to the Indiana Judicial Committee and Commissions Committee on Rules of Practice and Procedure. This is Mr. Henderson's first appointment to the Committee and will serve until his term expires in June of 2012.

The Supreme Court Committee on Rules of Practice and Procedure was created by the Court to conduct a continuous study of the Indiana Rules of Procedure. The Committee is charged with reporting to the Court with recommendations and proposed amendments to promote simplicity in procedure, just determination of litigation, and elimination of unjustified expense and delay. The Committee also serves as the evidence rules review committee established pursuant to Rule 1101 of the *Indiana Rules of Evidence*.

Except in emergencies or as directed by the Court, the Committee publishes proposed amendments by December 1 each year for public comment. Following a 60-day comment period, the Committee studies the comments received, makes appropriate amendments, and then submits a final draft of each proposal and any comments to the Court by May 1.